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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GLENN GERALD ETHIER,

Defendant and Appellant.

G039844

(Super. Ct. No. 04CF2502)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Carla Singer, Judge. Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne McGinnis and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found Glenn Gerald Ethier guilty of two counts of willful, deliberate, and premeditated attempted murder. The jury determined these counts were committed for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1),<sup>1</sup> and Ethier personally discharged a firearm causing great bodily injury within the meaning of sections 667.5, 1192.7 and 12022.53, subdivision (d). The jury also found Ethier guilty of one count of actively participating in a criminal street gang (§ 186.22, subd. (a)). In a bifurcated proceeding, the trial court determined Ethier had previously been convicted of a serious and violent felony within the meaning of the “Three Strikes” law. The court sentenced him to 40 years to life in prison. In this appeal, he raises one issue of instructional error and complains there was insufficient evidence to support the jury’s criminal street gang verdicts. Finding his contentions lack merit, we affirm the judgment.

#### FACTS

On June 14, 2004, Daniel Saucedo and Adrian Rodriguez were shot in front of Lee’s Market in Santa Ana. Detective Kevin Ruiz investigated the shooting. When he arrived, the two victims had already been transported to the hospital. He found five bullet casings from a .45 Winchester automatic weapon in front of the store. There were no eyewitnesses present, but Ruiz reviewed surveillance videotape obtained from the store, which showed the shooting (these videotapes were shown to the jury).

On the videotape, Ruiz recognized Bruno Flores, an active member of the “Goldenwest” gang, and who had the gang moniker “Boo Boo.” The store was in an area where the Goldenwest gang was active. Ruiz saw on the videotape that Flores was standing near the shooter as they entered the store. Ruiz conducted research to determine the individuals whom Flores had been arrested with in the past, in an effort to determine the shooter’s identity. He found a 1992 arrest report involving Leonard Ethier, which

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<sup>1</sup> All further statutory references are to the Penal Code.

prompted Ruiz to recall a previous contact he had with Ethier. He compared a photograph of Ethier with the shooter in the videotape and determined Ethier was the shooter.

In early July, Ruiz interviewed 16-year-old Saucedo about the shooting. Saucedo stated Ethier approached him and Rodriguez, and said, “Goldenwest.” Saucedo replied, “Fuck Goldenwest” or “Golden Waffles.” Ethier pulled out a gun, which prompted Saucedo and Rodriguez to laugh. They did not believe Ethier would be “stupid enough” to shoot them in a public place. But then Ethier shot them both.

Ruiz also interviewed 14-year-old Rodriguez who recalled seeing Saucedo talking to Ethier, who appeared drugged out. When Rodriguez approached the two, he said, “What’s up?” Rodriguez stated he laughed at Ethier when he pulled out a gun. He did not remember anything after being shot. Rodriguez admitted he was a member of the Darkside gang.

Saucedo was shot a total of five times, in the back of his upper leg, arm, shoulder, and back. Rodriguez was shot in the chest. It was stipulated both victims suffered great bodily injury. After Ethier’s arrest, officers discovered Ethier had a dark blue tank top similar to the one worn by the shooter in the videotape.

Ruiz testified as the prosecution’s gang expert at trial. He provided some background on the Goldenwest gang, stating the gang had been in existence since the mid-1980s and the color blue is commonly used by its members. The “Darkside Killers” are a rival gang, and the victims were members of Darkside. The shooting occurred in Goldenwest’s claimed gang territory. At the time of the shooting, Goldenwest had more than 25 members and its primary activities were aggravated assault, or assault with a deadly weapon. Ruiz stated he investigated several assault incidents involving Goldenwest gang members in mid-2004 (around the same time the shooting took place).

Ruiz discussed past police contact with Ethier. In 1991, Ethier and a Goldenwest gang member, Richard Hernandez, were contacted by police during a

disturbance at a church carnival within Goldenwest territory. In 1994, the police conducted an investigation of Ethier, George Zamora, and Hugo Santana, relating to a crime. All three admitted they belonged to the Goldenwest gang. At the time, Ethier told the police his address was on South Clara Street, within Goldenwest gang territory. During a criminal investigation in 2003, a police report described Ethier as having a Goldenwest tattoo on the back of his head. In 2004, a report prepared by a state agency noted Ethier was affiliated with the Goldenwest gang. And finally, a psychologist's report from June 2006 indicates Ethier stated, "'in [his] neighborhood'" he needed to have a gun for protection.

Based upon his investigation of Ethier's background, and the crime committed, Ruiz opined Ethier was an active member of the Goldenwest criminal street gang when the shooting occurred in June 2004. He concluded Ethier benefitted the Goldenwest gang by shooting two rival gang members who were in Goldenwest territory. Ruiz stated Ethier's conduct would have enhanced his reputation, as well as the gang's reputation. After considering hypothetical situations consistent with the facts of the underlying case, Ruiz opined the crimes were committed by an active member of the Goldenwest gang and were committed for the benefit of the gang because the gang member was defending or representing his neighborhood by confronting and shooting potential rival gang members.

Ethier's uncle and mother testified on his behalf. His uncle, Bill Tafolla, testified about what it was like to live in a gang territory neighborhood, with frequent drive-by shootings. Tafolla testified he had been shot three different times outside his house in the 1990s. Ethier had witnessed two of the shootings, and ran to Tafolla's aid all three times. Tafolla was a Goldenwest gang member in the 1980s, and he did not consider it to be a criminal street gang in those early days. Ethier's mother testified her son became paranoid after being shot when he was only 14 or 15 years old.

Clinical forensic psychologist, Francisco Gomez, testified he interviewed and administered several psychological tests to assess Ethier. Gomez opined Ethier suffered from posttraumatic stress disorder, and people with this disorder are likely to overreact to situations. Gomez testified that after reviewing the videotape of the shooting, he believed the victims' movements towards Ethier caused him to overreact and shoot them.

## DISCUSSION

### *A. Instructional Error?*

Ethier contends the court erred in failing to instruct on the lesser included offense of attempted voluntary manslaughter based on heat of passion. He asserts the evidence supported a finding of adequate provocation based on the evidence the victims made confrontational statements to Ethier and they “were advancing on [Ethier] at the time he shot them. [Ethier] was, obviously, outnumbered by two or three to one.” He concludes the jury could have rejected his defense the shooting was an act of unreasonable self-defense, but rather accepted “the Darksiders’ actions and words were provocative, and were such that a person of average disposition would have acted rashly, without deliberation, out of passion or panic, rather than out of deliberation.”

Alternatively, Ethier maintains his attorney was ineffective for concurring in the trial court’s decision not to give the voluntary manslaughter instruction. We conclude the court and counsel did not err because the instruction was not supported by substantial evidence.

In a criminal case, the trial court must sua sponte instruct fully on all necessarily included offenses supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 161 (*Breverman*).) The court must give instructions on lesser included offenses “‘when the evidence raises a question as to whether all of the elements of the charged offense [are] present . . . .’” (*Id.* at p. 154.) “[T]he existence of ‘any evidence, no matter how weak’ will not justify instructions on a lesser included offense, but such

instructions are required whenever evidence that the defendant is guilty only of the lesser offense is ‘substantial enough to merit consideration’ by the jury. [Citations.]

‘Substantial evidence’ in this context is “‘evidence from which a jury composed of reasonable [persons] could . . . conclude[]’” that the lesser offense, but not the greater, was committed. [Citations.]” (*Id.* at p. 162.)

Voluntary manslaughter, a lesser included offense of murder, is an intentional killing that lacks malice. (*Breverman, supra*, 19 Cal.4th at p. 153.) A defendant lacks malice “‘in limited, explicitly defined circumstances: Either when the defendant acts in a “sudden quarrel or heat of passion” [citation], or when the defendant kills in “unreasonable self-defense”—the unreasonable but good faith belief in having to act in self-defense [citations].’” (*Id.* at pp. 153-154.)

Ethier contends the evidence supports both unreasonable self-defense and heat of passion forms of manslaughter. The trial court instructed the jury regarding attempted murder, deliberation, premeditation, and attempted voluntary manslaughter based upon an imperfect self-defense theory. The court agreed with both parties that the heat of passion instruction was not supported by the evidence. The trial court stated, “It doesn’t appear to be a heat of passion defense. It does appear from the testimony of the mental health professional that this is a self[-]defense and no other kind of case.”

The forensic psychologist diagnosed Ethier as suffering from posttraumatic stress disorder, due to a very traumatic and violent upbringing. The psychologist learned Ethier was physically abused and assaulted as a child growing up in a violent and tough neighborhood. He was afraid to venture into certain areas, he had been shot, and over the years, he had learned to protect himself. He concluded Ethier had a long-term heroin addiction, and Ethier admitted heroin made him feel brave rather than afraid in his neighborhood. The psychologist opined the heroin helped Ethier cope with the posttraumatic stress symptoms.

The psychologist described Ethier as a very tense and nervous man, who due to his history, had become a “hypervigilant” person trying to avoid more trauma in his gang infested neighborhood. The psychologist opined that if Ethier got into a situation where he felt threatened, he would be prone to overreacting to protect himself from violence. After watching the videotape of the shooting, the psychologist stated that when the kids approached Ethier, his system was “already upregulated,” and their movement towards him would cause him to overreact.

This evidence does not support the theory Ethier now advances, that a reasonable person in his shoes would have panicked and rashly reacted the same way if “accosted by two immature gangsters who were operating outside their own turf, and enjoying it[]” in a rough neighborhood. Ethier argues the jury could have concluded any hypervigilant person with a similar traumatic background would have pulled out a gun and shot the two unfriendly gangsters in similar circumstances. But the heat of passion theory of voluntary manslaughter has an objective component. There must be evidence not only that Ethier acted in the heat of passion when he shot the victims, but that a reasonable person would feel similarly provoked based on the same circumstances. As aptly noted by the Attorney General, while gang members are prone to extremely violent reactions and passions, “[o]rdinary reasonable people do not become homicidally enraged in response to someone asking them ‘what’s up?’ Requiring the instruction in this case would ‘compel adoption of a reasonable gang member standard. [Citation.]’” (Citing *People v. Jefferson* (2004) 119 Cal.App.4th 508, 520.) We agree a person of average disposition may have felt fear when approached by two teenage gang members in front of store in a rough neighborhood, but would not have been aroused to a passion great

enough to commit murder. The evidence did not justify instructions of heat of passion voluntary manslaughter.<sup>2</sup>

*B. Insufficient Evidence?*

Ethier asserts there was insufficient evidence he was an active participant in the Goldenwest gang or that he acted for the benefit of that gang, and therefore, we must reverse his conviction for street terrorism (count 3), and the jury's true findings on the gang crime enhancements on counts 1 and 2. He argues the shooting was "a matter of a personal reaction to hostile, threatening behavior by some gang members operating outside their own territory[,]” and he did not intend his actions to further the interests of Goldenwest gang. He adds, “there was virtually no evidence” he was presently a Goldenwest gang member (the tattoo could be old), and he was not in the company of gang members during the incident. We find there is substantial evidence to support the jury's verdict.

“The applicable standard of review is well settled: To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment. The standard of review is the same when the prosecution relies mainly on circumstantial evidence.” (*People v. Valdez* (2004) 32 Cal.4th 73, 104, internal citations and quotation marks omitted.)

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<sup>2</sup> In light of our conclusion there was no error, we need not address Ethier's claim of ineffective assistance of counsel for his failure to request an instruction on heat of passion involuntary manslaughter.



We conclude substantial evidence supports the street terrorism conviction and the gang enhancement findings. Ethier correctly notes that both street terrorism (§ 186.22, subd. (a))<sup>3</sup> and the gang sentencing enhancement (§ 186.22, subd. (b)(1))<sup>4</sup> share the common element of requiring evidence the defendant engaged in criminal conduct with the specific intent to further or benefit the gang. The substantive offense differs from the enhancement in that it also requires proof the defendant is a current active participant in the gang. On appeal, Ethier's attack is limited to these two elements.

We will begin with Ethier's contention there was *no evidence* he was an active participant in the Goldenwest gang or, at best, it can only be proven he was in the gang years before. He is wrong. Ruiz testified Ethier had several recent gang-related contacts with the police. In 2003, it was documented Ethier had a gang tattoo. In 2004, the same year this shooting took place, one police report noted Ethier admitted he was in the gang, and another report prepared by a different state agency noted he was affiliated with the Goldenwest gang. One of the victims reported Ethier said, "Goldenwest" at the beginning of their confrontation, and the incident occurred in Goldenwest's claimed territory. The victims were shot after making the disrespectful statements "Golden Waffles" or "Fuck Goldenwest." And finally, contrary to Ethier's claim, the record indicates another Goldenwest member was present that day. After viewing the videotape

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<sup>3</sup> Section 186.22, subdivision (a), provides: "Any person who actively participates in any criminal street gang with knowledge that its members engage in or have engaged in a pattern of criminal gang activity, and who willfully promotes, furthers, or assists in any felonious criminal conduct by members of that gang, shall be punished by imprisonment in a county jail . . . ."

<sup>4</sup> The gang sentencing enhancement, section 186.22, subdivision (b)(1), provides an additional punishment for "any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ."

showing the shooting, Ruiz testified he recognized Goldenwest gang member Flores (having the gang moniker Boo Boo). In the videotape, Flores appeared to accompany Ethier as they entered the store shortly before the shooting. Ruiz testified the videotape shows the two men together in the store. The men can be seen stopping and talking after exiting the store. Flores then walks away, out of the range of the camera. Although Flores is not shown on the videotape during the shooting, it was Ruiz's recognition of Flores and his gang association with Ethier that led Ruiz to identifying Ethier as the shooter. Ruiz testified that based on his training and experience, and his review of this case, Ethier was an active participant in the Goldenwest gang at the time of the shooting. Based on the above body of direct and circumstantial evidence, we conclude the evidence was sufficient to support the jury's verdict on the street terrorism offense.

Similarly, Ethier's claim he did not commit the crime to promote, further, or assist the Goldenwest gang fails. He draws our attention to the evidence he was hypervigilant and overreacted to a threatening situation due to his posttraumatic stress disorder, and not because he intended to serve the Goldenwest gang. This was the same defense offered at trial and rejected by the jury in favor of the evidence and expert testimony the crime was committed to benefit and promote the Goldenwest gang. The jury reasonably believed the evidence Ethier shot two rival gang members in Goldenwest's claimed gang territory after they insulted his gang. It was reasonable to conclude the shooting would enhance Ethier's and the gang's reputation. Ruiz testified that in his opinion, given hypothetical situations consistent with the facts in the instant case, the shooting was committed for the benefit of the gang because the gang member was defending or representing his neighborhood by confronting and harming rival gang members. It was for the jury to weigh all the evidence and decide who to believe. It cannot be said the evidence was insufficient to support its finding Ethier shot the two rival gang members in his gang's claimed territory to promote, further, or assist the Goldenwest gang.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

FYBEL, J.